

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
MINUTE SHEET
BEFORE THE HONORABLE JUDITH C. HERRERA

Suppression Hearing

CR No:	18-3495 JCH	USA vs.	Smith		
Date:	11/5/20	Defendant:	Douglas Smith		Interpreter: n/a
Time In/Out:	9:02 a.m./12:07 p.m.	Total Time:	3 hours 5 minutes		Hearing in: remote - via Zoom
Clerk:	V. Loman	Court Reporter:	Paul Baca	Probation Officer:	n/a
AUSA:	Novaline Wilson & Kyle Nayback		Defendant's Counsel:	Aric Elsenheimer	

PROCEEDINGS

9:01 a.m. Court in session; parties state appearances. Defendant present in courtroom with defense counsel. Court hearing is via Zoom. Mr. Elsenheimer invokes the Rule. Court asks any witnesses subject to the Rule to remain outside hearing process.

9:08 a.m. Mr. Nayback calls Saige Libertore. Ms. Libertore sworn. Mr. Nayback begins direct examination.

9:12 a.m. Mr. Nayback shows Ms. Libertore Gov.'s Ex. 1, a photograph of model Ms. Libertore constructed. She testified the photograph was a fair and accurate representation of the model. Mr. Nayback moves its admission for purposes of this hearing. No objection. **Court admits Gov.'s Ex. 1 for purposes of hearing.** Mr. Nayback shows Ms. Libertore Gov. Ex. 2, a photograph of model Ms. Libertore created, asks questions about it, and moves its admission. No objection. **Court admits Gov. 2.** Mr. Nayback shows Ms. Libertore Gov. Ex. 3, a photograph of model. Mr. Nayback asks questions about it and moves its admission. No objection for purposes of this hearing. **Court admits Gov. Ex. 3 for purposes of hearing.** Mr. Nayback resumes direct examination.

9:22 a.m. Mr. Elsenheimer begins cross examination of Ms. Libertore.

9:26 a.m. Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. A, a photograph of name plate on model, asks questions, and moves its admission. No objection. **Court admits Def.'s Ex. A.** Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. B, photograph of model, asks questions, and moves its admission. No objection. **Court admits Def.'s Ex. B.** Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. C, a photograph of model from view of driveway, asks questions, and moves its admission. No objection. **Court admits Def.'s Ex. C.** Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. E, photograph of crime scene, asks questions, and moves its admission. No objection. **Court admits Def.'s Ex. E.** Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. G, a photograph of model standing in front of carport looking towards front door of Defendant's house, and asks questions. Mr. Elsenheimer asks witness questions about Def.'s Ex. H, a photograph from a similar vantage point as Def.'s Ex. G. Defense moves admission of Def.'s Ex. H. No objection. **Court**

admits Def.'s Ex. H. Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. I, a photograph of the front door of Defendant's house with step, asks questions about it.

9:42 a.m. Mr. Elsenheimer resumes direct examination about Def.'s Ex. G and I.

9:46 a.m. Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. J, a photograph of front door of Defendant's house, and asks questions. Mr. Elsenheimer moves admission of Ex. J. No objection. **Court admits Def.'s Ex. J.**

9:53 a.m. Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. K, a photograph of model looking towards shed, asks questions, and moves its admission. No objection. **Court admits Def.'s Ex. K.**

9:54 a.m. Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. L, a photograph of model of inner courtyard from driveway and asks questions. Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. M, a photograph of courtyard across the driveway and asks questions about it. Mr. Elsenheimer moves admission of Def.'s Ex. L and M. No objection. **Court admits Ex. L and M.**

10:00 a.m. Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. N, a photograph of courtyard from driveway, asks questions, and moves admission of Def.'s Ex. N. No objection. **Court admits Def.'s Ex. N.** Mr. Elsenheimer asks questions about Def.'s Ex. P, a photograph of model looking to the north from the south, and he moves its admission. No objection.

Court admits Def.'s Ex. P. Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. Q, a photograph of model from driveway, and asks questions. Mr. Elsenheimer shows Ms. Libertore Defendant's Ex. R, a photograph from driveway towards house and of telephone pole. Mr. Elsenheimer asks questions concerning Ex. R and Q. Mr. Elsenheimer moves admission of Q and R. No objection. **Court admits Ex. Q and R.** Mr. Elsenheimer continues questioning.

10:21 a.m. Cross examination ends. No redirect examination. Ms. Libertore excused. Mr. Nayback moves admission of model.

10:22 a.m. Ms. Wilson calls Theodore Chavez. Mr. Chavez sworn.

10:23 a.m. Recess.

10:27 a.m. Ms. Wilson begins direct examination of Mr. Chavez. Ms. Wilson asks questions about Gov.'s Ex. 1, Mr. Chavez's CV. Ms. Wilson moves admission of Gov.'s Ex. 1. No objection. **Court admits Gov.'s Ex. 1.** Ms. Wilson resumes questioning. Ms. Wilson moves witness as an expert witness in the field of firearm trajectory analysis. Mr. Elsenheimer objects.

10:35 a.m. Mr. Elsenheimer begins voir dire examination.

10:39 a.m. Mr. Elsenheimer ends voir dire and does not object to the Court recognizing Mr. Chavez as an expert but still objects to his testifying in this case based on *Daubert* factors. **Court recognizes Mr. Chavez as an expert in field of trajectory analysis.** Ms. Wilson resumes direct examination.

10:40 a.m. Ms. Wilson asks about Gov.'s Ex. 2, 3, and 4. Ex. 2 is slide material Mr. Chavez prepared for today's testimony. Ex. 3 and 4 are large images of the content of slide three. Ms. Wilson moves admission of Gov.'s Ex. 2, 3, and 4. Mr. Elsenheimer has no objection. **Court admits Gov.'s Ex. 2, 3, and 4.** Ms. Wilson resumes direct examination.

11:01 a.m. Ms. Wilson shows Mr. Chavez Gov.'s Ex. 5, his laboratory report, and Ex. 6, a supplemental graphic for the laboratory report. Ms. Wilson resumes questioning and moves admission of Ex. 5 and 6. Mr. Elsenheimer has no objection to admission for purposes of hearing. **Court admits Gov.'s Ex. 5 and 6 for purposes of this hearing.**

11:09 a.m. Mr. Elsenheimer begins cross examination of Mr. Chavez. Mr. Elsenheimer asks Mr. Chavez about his written notes.

11:36 a.m. Mr. Elsenheimer asks questions about Ex. 6 and resumes questioning.

12:00 p.m. Cross examination ends. No redirect examination. Mr. Chavez excused. Court states that the testimony has concluded, and no additional arguments are required. Court asks parties to respond in writing about issue of statements. Court asks Government to submit a transcript highlighted with statements they want admitted, and then the defense can respond with its own highlighting so Court can make a decision. **The Court requests what statements Government seeks to admit in ten days. Mr. Elsenheimer can respond within five days thereafter.**

12:04 p.m. Mr. Elsenheimer asks about a trial setting. The Court does not have a specific time frame yet, but not this year. The Court explains that right now there is one jury courtroom that is being shared. The Court notes that with the virus, more people are testing positive, and there are cases that probably have higher priority over this one because Defendant is not in custody. The Court notes these various considerations that go into setting a trial date, and says that a spring trial may happen. Once there are rulings on the motions and we are in a position to make a plan, the Court will set a status conference to figure out dates, availability of witnesses, and things of that nature.

12:07 p.m. Recess.